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PATENTS

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Weiner

Examiner: Ruddock

Serial No.: 10/678,316

Group Art Unit: 1771

Filed October 2, 2003

For: IMBEDDED VINYL FLOORING PRODUCT

**APPEAL BRIEF**

Commissioner of Patents and Trademarks  
Alexandria, Virginia 22313-1450

Sir:

Further to the Notice of Appeal filed June 2, 2006, herewith are three copies of Appellants' Brief on Appeal. The statutory fee of \$250 for the Notice of Appeal fee was paid on June 2, 2006. The \$250 fee for the submission of the appeal brief is enclosed herewith. Please charge any additional fee or credit any overpayment to Deposit Account No. 13-3403. Three copies of this page are attached for this purpose.

**I. PRESENTATION OF THE APPEAL**

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**A. Real Party in Interest**

The real party in interest is Appellants' assignee, Product Concepts Residential., LLC, a Georgia limited liability company with its principal place of business at 525-B Calahan Road, Dalton, GA 30722.

**B. Related Appeals and Interferences**

There are no related appeals and interferences.

**C. Status of Claims**

At the time of the final Office Action, claims 1-10 were pending in the



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U.S. Patent & TMOfc/TM Mail Rcpt Dt. #34

application. The application was initially filed with 10 claims as a division of U.S. Patent No. 10/125,290, now U.S. Patent No. 6,696,004. The claims of this application have not been amended.

A copy of the claims subject to this appeal appears in Appendix A.

#### **D. Status of Amendments**

No proposed amendments have been proposed or entered after final.

#### **E. Summary of Invention**

Most generally, the present invention relates to a vinyl flooring product having a design visible from a top surface of the product, and more particularly to a vinyl flooring product having an imbedded web creating a pattern visible from above. (Page 1, lines 5-6). As shown in Figure 1, a mesh **10** has limbs or runners **32** which meet at one or more junctures **35,37** and circumscribe openings **34**. (Page 2, lines 21-22). The runners **32** have top surface **36** and bottom surfaces **37**. (Page 2, line 23 – Page 3, line 1). The mesh **26** is embedded in a presently preferred process into a liquid vinyl layer and cured. (Page 3, lines 13-15).

The depth at which the mesh **10** is imbedded in the liquid influences the design on the flooring product after curing in the oven. (Page 4, lines 3-4). In all of the embodiments, the vinyl forms a vinyl bottom layer **42** which forms a non-porous sheet surface which extends below the mesh **10**. (Page 4, lines 8-9). In a first embodiment, the bottom surface **37** of the runner is below a top surface **44** of the vinyl. (Page 4, lines 8-9). Slight wicking of the vinyl may be observed on the walls **30** of the runners **32**. (Page 4, lines 9-10). In other embodiments, the vinyl may wick up toward a top surface **36** and form bubbles **36** within the openings **34** of the mesh **10** without obscuring the top surface

**36** of the mesh **10**. (Page 4, lines 10-13). In yet another embodiment, the vinyl extends through the openings **35** and extends over at least some of the top surface **36** of the first mesh **10** as an overhang. (Page 4, lines 19-21). Prototype designs of various embodiments are enclosed herewith.

#### **F. Issues**

1. Whether the Examiner properly rejected claims 1-7, 9 and 10 as being anticipated by Slosberg, U.S. Patent No. 4,689,258 (hereinafter "Slosberg") in the Final Office Action.
2. Whether the Examiner properly rejected claim 8 as being obvious over Slosberg, in view of Sugahara, U.S. Patent No. 5,780,147 (hereinafter "Sugahara") in the Final Office Action.

#### **G. Claims**

1. Claims 1 and 9 stand or fall together and they should be considered together. Claim 2 has additional grounds for allowance, and should be considered separately. Claims 3 and 4 have additional grounds for allowance, and should be considered separately. Claim 5 has additional grounds for allowance, and should be considered separately. Claim 6 has additional grounds for allowance, and should be considered separately. Claim 7 has additional grounds for allowance, and should be considered separately. Claim 10 has additional grounds for allowance, and should be considered separately.

2. Claim 8 should be considered by itself.

## II. ARGUMENT

### A. Anticipation Rejection of Claims 1-4, 6-7 and 9 based on Slosberg

#### 1. Rejection of Claims 1-4

Slosberg shows a floor mat and method of construction. This floor mat includes the use of a surface covering material which “has been discovered which is a resilient, abrasion resistant, *foraminous* surface covering material which *material allows a liquid, such as water to run easily though...*” (emphasis added)(Col. 1, lines 60-63) Moreover, the “surface material *replaces* a flat, solid material as a wear resistant face without employing the same amount of plastic material.” (emphasis added)(Col. 1, line 67-Col. 2, line 1). While “*foraminous*” is not believed to be a particularly common word utilized in common vernacular, the definition the Applicant located is “full of holes, porous” and is provided in Exhibit B. The specification continues: “The surface covering comprises an *open*, fibrous, synthetic mesh material in which the filaments or fibers have been coated with a polymer to present an irregular *open, discontinuous*, wear-resistant face surface and a lower *open* gripping surface.” (emphasis added)(Col 2, lines 1-6).

An open-mesh layer **12** shown in Figures 1-5 is coated with a high density vinyl chloride plastisol as a polymeric coating **16** which forms a high density, polyvinyl foam layer **16**. (Col. 4, lines 47-50) The lower surface is composed of a plurality of irregular islands **18** composed of the vinyl chloride with the surface covering **14** having substantial open areas **20** on the top surface **22** and also on the bottom surface **24**. (Col. 4, lines 52-56). The islands **18** are formed by the vinyl plastisol draining onto the lower release surface during the construction of the surface covering **14** and prior to curing the plastisol. (Col. 4, lines 62-65)

Coating of the fibrous material is described as being by dipping, spraying or coating or otherwise contacting the layer of fibrous material so as to coat the fibers and also to provide for some accumulation of the liquid polymeric material at the fibrous intersections. (Col. 3, lines 27-32). Generally, excess material runs down and forms a smooth, but discontinuous, surface on the one or the lower side to form a plurality of islands having a generally planar surface against the pressure-release surface. (Col. 3, lines 32-36). The formation of the islands is described as being done in such a way as to not “affect[] the resilient nature of the nylon filament fibers forming the mat layer.”(Col.3, lines 45-49) Furthermore: “The viscosity of the vinyl plastisol and the time on the surface ***should not be sufficient to permit the vinyl plastisol to form a completely enclosed coating on the lower surface*** since the nature of the surface mat should be as such ***to provide for substantial open area throughout the depth of the coated nylon fiber area.*** (emphasis added)(Col. 5, lines 50-55).

The product of claim 1 provides a vinyl layer with an imbedded mesh:

1. A flooring product comprising:  
a vinyl layer having a bottom layer portion and a top portion; and  
a skeletal frame having a pattern of runners disposed about  
openings, said runners having a height between a top surface and a  
bottom surface, said skeletal frame imbedded into the top layer  
portion of the vinyl sheet layer wherein bubbles are formed in the  
top portion of the vinyl sheet layer and have a top surface which  
extend a distance above the bottom surface of the skeletal frame  
and into the openings, ***and the bottom layer portion forms a non-porous sheet below the skeletal frame and top portion of the vinyl layer.*** (emphasis added).

The element of a bottom layer portion forming a non-porous sheet below the skeletal frame and top portion of the vinyl layer is explicitly taught away from by Slosberg. This element has consistently been argued as missing from the rejections, to no

avail. No citation to any portion of Slosberg has been provided by any of the Office Actions as to where corresponding structure might be found. In the Advisory Action Before the Filing of an Appeal Brief, the Examiner states: "It should be noted that in the final product, the vinyl coating of Slosberg would have the same structure and appearance as the vinyl sheet of the present invention." The Applicant respectfully disagrees with this analysis of the Slosberg reference. In fact, the Applicant believes Slosberg explicitly teaches away from the claimed element.

Section 2131 of the MPEP requires that TO ANTICIPATE A CLAIM, THE REFERENCE MUST TEACH EVERY ELEMENT OF THE CLAIM. Specifically: "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegall Bros. v. Union Oil Co. of California, 814 F.2d. 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). The non-porous sheet of the bottom layer portion of the vinyl layer element cannot be met by Slosberg since Slosberg explicitly teaches away from providing such structure.

Merely changing the anticipation rejection to an obviousness rejection would also not be proper since MPEP § 2142 requires that when establishing a prima facie case of obviousness, the references must teach or suggest all the claim limitations. In re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991), MPEP § 2145 (See X. Arguing Improper Rationales for Combining References, D. References Teach Away from the Invention Render Prior Art Unsatisfactory for Intended Purpose) and MPEP § 2141.02, namely In re Grasselli, 713 F.2d 731, 743, 218 USPQ 769, 779 (Fed. Cir. 1983) and W.L.

Gore & Associates, Inc. v. Garlock, Inc., 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983),  
*cert. denied*, 469 U.S. 851 (1984).

Since Slosberg teaches away from providing a non-porous sheet as a portion of the bottom layer portion of the vinyl layer as claimed by the Applicant and explained above, claims 1 is believed to be allowable. Claim 9 stands or falls with claim 1.

## 2. Rejection of Claim 2

Claim 2 depends from claim 1 and requires the additional element of providing a repeating pattern in a skeletal frame. The mesh in Slosberg is consistently referred to as “formed of filaments of melt-spun poly-meric particularly thermoplastic synthetic fiber, *randomly* melt bonded at the filament intersections...”(emphasis(Col. 1, lines 35-37). The applicant would propose that randomness may be an exact opposite of a claimed element including a “repeating pattern”. Accordingly claim 2 appear to be expressly taught away from by Slosberg as well.

## 3. Rejection of Claims 3 and 4

Claim 3 depends from claim 1 and requires the additional element of providing a top surface of the bubble which extends a distance above the top surface of the runners of a skeletal frame and completely fills openings between runners. While it is possible to see how an island 18 of Slosberg could coat and thereby extend above a top surface of a portion of a mesh 6, it is much more difficult to see how an opening between runners is completely filled when there does not appear to be a description or a suggestion of such a capability in the Slosberg specification. Islands on junctures of “runners” is a somewhat different concept than filling all of the space between junctures as is claimed. Claim 3

may be separately allowable on this basis. Claim 4 depends from claim 3 and stands or falls with that claim.

#### **4. Rejection of Claims 5**

Claim 5 depends from claim 4 and requires the additional limitation of the bubbles completely covering the surface of the runners and having valleys which extend above the top portion of the skeletal frame.

While a coating could cover the surface of the runners in Slosberg, no structure has been identified as “valleys” in any of the Office Actions which extend above the top portion of the skeletal frame. This would provide a separate basis for allowance for this claim in addition to the bases provided above for claims 1 and 3.

#### **5. Rejection of Claim 6**

Claim 6 depends from claim 1 and includes the additional limitation of imbedding at multiple depths to create a design. While Slosberg teaches spraying, dipping, coating or otherwise contacting the mesh with vinyl plastisol, there is not believed to be a teaching or suggestion for imbedding at multiple depths as claimed. This is believed to provide a separate basis for allowance for claim 6.

#### **6. Rejection of Claim 7**

Claim 7 depends from claim 1 and requires the additional limitation of substantially filling the openings between the runners with the top portion of the vinyl layer. This claim is directed to at least one of the embodiments and is not believed to be shown or described by the Slosberg reference. This logic is similar (although the claimed subject matter is slightly different) than the response to the rejection for claim 3. This is believed to provide a separate basis of allowance for claim 7.

## **7. Rejection of Claim 10**

Claim 10 depends from claim 1 and requires the additional limitation of requiring the bubbles to fill the openings between the runners to a first depth throughout the openings. This claim is directed to at least one of the embodiments and is not believed to be shown or described by the Slosberg reference. This logic is similar (although the claimed subject matter is slightly different) than the response to the rejection for claim 3. This is believed to provide a separate basis of allowance for claim 10.

## **B. Obviousness Rejection of Claim 8 Based on Slosberg in view of Smithies**

Claim 8 depends from claim 1. Smithies, U.S. Patent No. 5,780,147 teaches a laminate of a prepeg layer (A), a thermosplastic resin layer (B) and a hot melt resin adhesive layer (C). (Abstract). In a second embodiment of the invention, a “metal foil, a punching metal foil, or a plain weave” is used with the adhesive layer (Col. 4, lines 41-44). The laminate of Smithies is illustrated in all of the figures as being non-porous.

Other than the applicant’s specification, the Applicant has found no motivation to combine Smithies with Slosberg. The metal foil is described in Smithies as added as “a reinforcing core material” (Col 6, line 20). Slosberg uses Enkamat ® which is described as being pliable (Col 5, line 25). It is unclear why one skilled in the art would be “motivated” to substitute a reinforcing material for a pliable material when the purpose of Slosberg is to be used as a floor mat to assist in trapping debris from the feet of users.

Nevertheless, as described above, not only does Slosberg not have a non-porous vinyl layer, it teaches away from providing such structure. Smithies is not believed to provide this claimed structure either with relation to the claimed bubbles relative to a non-porous layer. Accordingly, it is extremely difficult to see how the combination could

teach the claimed combination of elements when at least some of the elements are missing. Claim 8 is thus believed to be allowable.

### III. CONCLUSION

Claims 1-10 are not believed to be anticipated or obvious over Slosberg , US. Patent no. 4,689,258 which is believed to *expressly teach away from the claimed subject matter*. Allowance of claims 1-10 is respectfully requested.

Respectfully submitted,

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## CERTIFICATE OF MAILING

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Beverly L. Middleton  
Beverly L. Middleton

## APPENDIX A

1. A flooring product comprising:
  - a vinyl layer having a bottom layer portion and a top portion; and
  - a skeletal frame having a pattern of runners disposed about openings, said runners having a height between a top surface and a bottom surface, said skeletal frame imbedded into the top layer portion of the vinyl sheet layer wherein bubbles are formed in the top portion of the vinyl sheet layer and have a top surface which extend a distance above the bottom surface of the skeletal frame and into the openings, and the bottom layer portion forms a non-porous sheet below the skeletal frame and top portion of the vinyl layer.
2. The flooring product of claim 1 wherein the pattern of the skeletal frame is a repeating pattern.
3. The flooring product of claim 1 wherein the top surface of the bubbles extend a distance above the top surface of the runners of the skeletal frame and completely fill the openings between the runners.
4. The flooring product of claim 3 wherein the bubbles overhang at least a portion of the top surface of the runners of the skeletal frame.
5. The flooring product of claim 4 wherein the bubbles

completely cover the top surface of the runners and have valleys extending above the top portion of the skeletal frame.

6. The flooring product of claim 1 wherein the skeletal frame is imbedded at several depths relative to the top portion of the vinyl layer to create a particular design.

7. The flooring product of claim 1 wherein the openings between the runners are substantially filled with the top portion of the vinyl layer.

8. The flooring product of claim 1 wherein the skeletal frame is a metal screen.

9. The flooring product of claim 1 wherein the skeletal frame is a nylon mesh.

10. The flowing product of claim 1 wherein the bubbles extend to fill the openings to a first depth throughout the openings.

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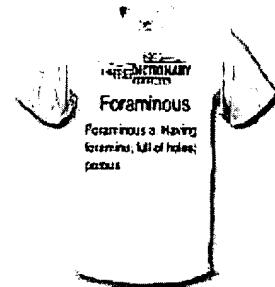
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### Fo`rami`nous

a. 1. Having foramina; full of holes; porous.

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